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DEPARTMENT OF
WATER RESOURCES

Attorneys for Idaho Ground Water Appropriators, Inc.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS NOS. 36-
04013A, 36-04013B AND 36-07148 (SNAKE
RIVER FARM); AND TO WATER RIGHTS
NOS. 36-07083 AND 36-07568 (CRYSTAL
SPRINGS FARM)

**IGWA's PETITION FOR RECONSIDERATION
OF JULY 8, 2005 ORDER AND REQUEST FOR
STAY
(CLEAR SPRINGS)**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Aberdeen-American Falls Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District, Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District (the "Ground Water Districts" or "IGWA"), hereby petitions for reconsideration, and requests a hearing on, the Director's July 8, 2005 *Order* ("July 8 Order") issued in response to the Clear Springs Foods, Inc. ("Clear Springs") delivery call ("Delivery Call"). IGWA further petitions for a stay of the July 8 Order until the Director convenes and concludes such a hearing. IDAPA 37.01.01.780.

While the Idaho Department of Water Resources (“Department”) has no substantive administrative rules respecting petitions for reconsideration, Idaho case law addressing motions for reconsideration brought under Idaho Rule of Civil Procedure 11(a)(2)(B) instructs that a tribunal or decision maker “should take into account any new facts presented by the moving party that bear on the correctness” of the order. *Nationsbank Mortgage Corp. of New York v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995); *Coeur D’Alene Mining Co. v. First National Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

Grounds for Reconsideration and Hearing

1. In the July 8 Order, the Director erroneously concludes that the Ground Water Districts owe any amount of water to Clear Springs as mitigation or to avoid material injury to Clear Springs. In reaching the conclusion that junior ground water rights are subject to curtailment to fill the Clear Springs aquaculture rights, the Director failed to consider and/or give due weight to relevant hydrologic and economic factors as required by Idaho law. These include, among others, those contained in the Affidavits of Charles M. Brendecke and John Church, which IGWA previously filed on March 23, 2005 in the matter of the delivery call by the Surface Water Coalition, which also is pending before the Department. IGWA hereby incorporates these Affidavits and their accompanying exhibits. IGWA contests the Director’s finding that material injury has occurred to Clear Springs’ water rights as a result of ground water pumping.

2. Portions of the Clear Springs water rights are subject to a finding of forfeiture, abandonment and/or adverse possession. The July 8 Order fails to evaluate this issue or to make findings and conclusions concerning it.

3. The July 8 Order errs in finding that Clear Springs is employing reasonable efforts to divert water for those portions of its water rights for which replacement water is being required.

4. The July 8 Order fails to address the fact that Clear Springs is diverting ground water, not surface water, and that it is required to extend or advance its diversion capability beyond that found in the July 8 Order, and at least to its reasonable economic reach, before any delivery call to supply its rights can be honored. IGWA contends that the July 8 Order fails to consider whether Clear Springs is entitled to appropriate the hydraulic pressure in the Eastern Snake Plain Aquifer (“ESPA”), at least where doing so conflicts with the maximum use of the resource.

5. Similarly, the July 8 Order impermissibly proposes to curtail certain ground water users without first establishing whether doing so is consistent with law pertaining to reasonable pumping levels.

6. The July 8 Order fails to consider the fact that the Clear Springs’ water rights were established in, and at the time of their appropriation relied upon, an artificially high ground water table resulting from seepage and wastewater, and that Clear Springs may not, as a matter of law, curtail others in an attempt to maintain or replace such conditions.

7. The July 8 Order fails to consider or determine whether the use of junior ground water rights by the Ground Water Districts’ members “affects, contrary to the declared policy of [full economic development], the use of the senior right.” Idaho Code § 42-237b. Although the Ground Water Act mandates that conjunctive administration of ground water rights to fill senior surface water rights hinges directly on the question of whether such administration is consistent with full economic development, the July 8 Order gives that factor no consideration.

8. In issuing the July 8 Order, the Director has violated Idaho Code §§ 42-237b-d by failing to follow the statutory mandate to appoint a local ground water board and set this matter for hearing before it. While Title 42, Chapter 6 may not contemplate a local ground water board and hearing for the type of administration it contemplates, a more specific statute addressing ground water—such as Idaho Code § 42-237—should be seen as controlling over the more general provisions of Chapter 6. *People ex rel. Springer v. Lytle*, 1 Idaho 143 (1867); *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002).¹

9. The July 8 Order fails to describe the accounting process or system that will be used to track future obligations and carry-forward credits.

10. The July 8 Order fails to consider the extent to which Clear Springs' delivery call should be barred by the doctrines of waiver, estoppel, and laches.

Conclusion

For the foregoing reasons, IGWA petitions the Director to reconsider the July 8 Order, and instead enter an order denying the Clear Springs delivery call.

Pursuant to Idaho Code § 42-1701A(3), and having been aggrieved by the Director's July 8 Order, IGWA requests that the Director convene a hearing in this matter. IGWA requests that the Director stay the implementation of the July 8 Order pending the hearing.

¹ The Ground Water Act mandates that

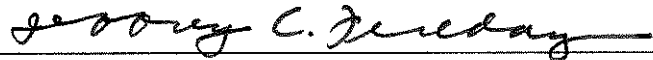
[w]henver any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority. . . such person as claimant, may make a written statement under oath of such claim to the director. . . .

I.C. § 42-237b. If the Director deems the statement sufficient, he "shall issue a notice setting the matter for hearing before a local ground water board. . . ." *Id.* Chapter 6 does not contain the specific distinctions between senior and junior surface and ground water rights contained in the Ground Water Act, nor does it provide for a hearing—much less one before a ground water board.

IGWA reserves the right to augment this petition, and to state additional or different grounds for reconsideration or challenge, as this matter proceeds.

RESPECTFULLY SUBMITTED this 19th day of July 2005.

GIVENS PURSLEY LLP

A handwritten signature in cursive script, reading "Jeffrey C. Fereday", is written over a horizontal line.

Jeffrey C. Fereday
Michael C. Creamer

Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July 2005, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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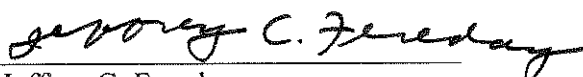
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